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In The

# Supreme Court of the United States

IN RE: NED COMER; BRENDA COMER; ERIC HAYGOOD; BRENDA HAYGOOD; LARRY HUNTER; SANDRA L. HUNTER; MITCHELL KISIELWESKI; JOHANNA KISIELWESKI; ELLIOTT ROUMAIN; ROSEMARY ROUMAIN; JUDY OLSON AND DAVID LAIN,

*Petitioners.*

**On Petition For A Writ Of Mandamus To The United States Court Of Appeals For The Fifth Circuit**

## PETITION FOR WRIT OF MANDAMUS

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## QUESTIONS PRESENTED FOR REVIEW

Where the litigants have perfected a right to an appeal under 28 U.S.C. § 1291, does the Circuit Court have a duty to render a decision?

When an en banc court loses its quorum after granting rehearing but before hearing argument en banc, can the remaining judges dismiss an appeal of right without a decision on the merits?

When an en banc court loses its quorum before deciding an appeal on rehearing en banc, does the original panel maintain control over the case?

## STATEMENT OF INTERESTED PARTIES

### Petitioners

Ned Comer; Brenda Comer; Eric Haygood; Brenda Haygood; Larry Hunter; Sandra L. Hunter; Mitchell Kisielweski; Johanna Kisielweski; Elliott Roumain; Rosemary Roumain; Judy Olson and David Lain.

### Respondent

United States Court of Appeals for the Fifth Circuit
Honorable Edith H. Jones, Chief Judge
Lyle W. Cayce, Clerk
600 S. Maestri Place
New Orleans, LA 70130-3408
(504) 310-7700

### Defendants/Appellees in *Comer v. Murphy Oil USA*

Murphy Oil USA; Universal Oil Products (UOP); Honeywell International Inc.; Shell Oil Company; ExxonMobil Corporation; AES Corp.; Alliance Resource Partners LP; Alpha Natural Resources Inc.; Arch Coal Inc.; Foundation Coal Holdings Inc.; Massey Energy Co.; Natural Resource Partners LP; Peabody Energy Corp.; Westmoreland Coal Co.; International Coal Group Inc.; Consol Energy Inc.; BP America Production Company; BP Products North America Inc.; Cinergy Corp.; Duke Energy Corp.; Reliant Energy Inc.; Allegheny Energy Inc.; ConocoPhillips Company; EON AG; The Dow Chemical Company; E.I. DuPont De Nemours & Co.; Entergy Corp.; FirstEnergy Corp.; FPL Group Inc.; Tennessee Valley Authority; Xcel Energy Inc.; Chevron USA Inc.; The American Petroleum Institute.

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Original Docketed Case:

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*Comer v. Murphy Oil USA, Inc.*, 2007 WL 6942285 (S.D.Miss. Aug. 30, 2007) (NO. 1:05-CV-436 LG-RHW)

*Reversed by*

*Comer v. Murphy Oil USA*, 585 F.3d 855, 69 ERC 1513 (5th Cir. (Miss.) Oct. 16, 2009) (NO. 07-60756)

*Rehearing en Banc Granted by*

*Comer v. Murphy Oil USA*, 598 F.3d 208 (5th Cir. (Miss.) Feb. 26, 2010) (NO. 07-60756)

*On Rehearing en Banc*

*Comer v. Murphy Oil USA*, 607 F.3d 1049, 70 ERC 1808 (5th Cir. (Miss.) May 28, 2010) (NO. 07-60756)

*Appeal Dismissed by*

*Comer v. Murphy Oil USA*, 607 F.3d 1049, 70 ERC 1808 (5th Cir. (Miss.) May 28, 2010) (NO. 07-60756)

## STATEMENT OF JURISDICTION

This Court has jurisdiction under U.S. CONST. art. III, § 2 and 28 U.S.C. § 1651(a) to issue a Writ of Mandamus directing the United States Court of Appeals for the Fifth Circuit to decide the appeal that was dismissed without a decision on May 28, 2010.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

**U.S. CONST. amend. V:**

> . . . nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**28 U.S.C. § 46:**

> **Assignment of judges; panels; hearings; quorum:**
>
> **(a)** Circuit judges shall sit on the court and its panels in such order and at such times as the court directs.
>
> **(b)** In each circuit the court may authorize the hearing and determination of cases and controversies by separate panels, each consisting of three judges, at least a majority of whom shall be judges of that court, unless such judges cannot sit because recused or disqualified, or unless the chief judge of that court certifies that there is an emergency including, but not limited to, the unavailability

of a judge of the court because of illness. Such panels shall sit at the times and places and hear the cases and controversies assigned as the court directs. The United States Court of Appeals for the Federal Circuit shall determine by rule a procedure for the rotation of judges from panel to panel to ensure that all of the judges sit on a representative cross section of the cases heard and, notwithstanding the first sentence of this subsection, may determine by rule the number of judges, not less than three, who constitute a panel.

**(c)** Cases and controversies shall be heard and determined by a court or panel of not more than three judges (except that the United States Court of Appeals for the Federal Circuit may sit in panels of more than three judges if its rules so provide), unless a hearing or rehearing before the court en banc is ordered by a majority of the circuit judges of the circuit who are in regular active service. A court en banc shall consist of all circuit judges in regular active service, or such number of judges as may be prescribed in accordance with section 6 of Public Law 95-486 (92 Stat. 1633), except that any senior circuit judge of the circuit shall be eligible (1) to participate, at his election and upon designation and assignment pursuant to section 294(c) of this title and the rules of the circuit, as a member of an en banc court reviewing a decision of a panel of which such judge was a member, or (2) to continue to participate in the decision of a case or controversy that was

heard or reheard by the court en banc at a time when such judge was in regular active service.

(d) A majority of the number of judges authorized to constitute a court or panel thereof, as provided in paragraph (c), shall constitute a quorum.

**28 U.S.C. § 1291:**

**Final decisions of district courts**

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

**5th Cir. R. 41.3:**

**41.3 Effect of Granting Rehearing En Banc.** Unless otherwise expressly provided, the granting of a rehearing en banc vacates the panel opinion and judgment of the court and stays the mandate.

**Fed. R. App. P. 47:**

**Local Rules by Courts of Appeals**

**(a) Local Rules.**

(1) Each court of appeals acting by a majority of its judges in regular active service may, after giving appropriate public notice and opportunity for comment, make and amend rules governing its practice. A generally applicable direction to parties or lawyers regarding practice before a court must be in a local rule rather than an internal operating procedure or standing order. A local rule must be consistent with – but not duplicative of – Acts of Congress and rules adopted under 28 U.S.C. § 2072 and must conform to any uniform numbering system prescribed by the Judicial Conference of the United States. Each circuit clerk must send the Administrative Office of the United States Courts a copy of each local rule and internal operating procedure when it is promulgated or amended.

(2) A local rule imposing a requirement of form must not be enforced in a manner that causes a party to lose rights because of a nonwillful failure to comply with the requirement.

**(b) Procedure When There Is No Controlling Law.**

> A court of appeals may regulate practice in a particular case in any manner consistent with federal law, these rules, and local rules of the circuit. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local circuit rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement.

## STATEMENT OF THE CASE

Petitioners have a statutory and constitutional right to have their appeal decided. Petitioners Ned Comer, et al. respectfully request that this Court issue a writ of mandamus directing the United States Court of Appeals for the Fifth Circuit to reinstate Petitioners' appeal and return it to the panel for final adjudication, so that Petitioners' rights may be honored. Such extraordinary relief is warranted by the extraordinary nature of this case.

Petitioners filed this climate change lawsuit against various coal, oil and energy companies seeking monetary compensation for damages they sustained. The district court dismissed the lawsuit, based on a flawed standing and political question

doctrine analysis, thereby closing the courthouse doors to these private litigants.

Petitioners timely appealed the dismissal to the United States Fifth Circuit Court of Appeals. There, a properly-constituted, three-judge panel heard argument and reversed the district court. The Defendants applied for rehearing en banc. Seven of the sixteen Fifth Circuit judges recused themselves, leaving nine active judges (the minimum to constitute an en banc quorum) to consider and vote on the application for rehearing en banc. Six of the nine voted to grant rehearing en banc. The court issued a supplemental briefing schedule and set the case for oral argument en banc. After briefing was complete but before the case was argued, another judge recused herself causing the court to lose its en banc quorum.

The clerk asked the parties to submit letter briefs stating their respective positions on what authority the Fifth Circuit had to act absent an en banc quorum. The parties filed their briefs setting forth their positions and offering alternative solutions. Then five of the remaining eight non-recused judges (less than one-third of the active judges of the Fifth Circuit) took the extraordinary action of dismissing the appeal, refusing to allow the original panel to act and leaving Petitioners with no decision on the appeal and no recourse. Can a United States Circuit Court of Appeals shirk its responsibility to adjudicate a matter properly before it and within its jurisdiction?

As this Court has long recognized, it is the Judiciary's duty to say what the law is.[1] In response to a five-judge order dismissing the appeal in *Comer v. Murphy Oil USA*, 607 F.3d 1049 (5th Cir. 2010), Petitioners ask this Court to direct the Fifth Circuit to reinstate the appeal and render a decision. This Court, since its inception, has acknowledged the fundamental principle at stake here:

> "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury . . . '[I]t is a settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and that every injury its proper redress.' The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."[2]

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[1] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174-78 (1803); *Cohens v. Virginia*, 19 U.S. 264, 404 (1821).

[2] *Marbury v. Madison*, 5 U.S. at 163 (quoting William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND Vol. 3 at 109 (Oxford 1765-1769)).

**PROCEDURAL BACKGROUND: A PROPERLY CONSTITUTED PANEL RENDERED A DECISION REVERSING THE DISTRICT COURT. THEN A NINE-JUDGE EN BANC COURT GRANTED REHEARING BUT SUBSEQUENTLY LOST ITS QUORUM BEFORE THE CASE WAS RE-ARGUED.**

After five years, this case has only one final decision – the district court judgment dismissing the case on political question and standing grounds. This case's history is summarized as follows:

| | |
|---|---|
| 09/20/2005 | Petitioners filed their lawsuit. |
| 08/30/2007 | The district court dismissed *Comer* for lack of standing and as non-justiciable.[3] |
| 09/17/2007 | The Petitioners timely appealed the dismissal.[4] |
| 01/25/2008 | The parties timely filed their briefs.[5] |
| 08/06/2008 | A panel was formed but one member was unable to participate, so the parties presented oral arguments to two panel members.[6] |

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[3] Rec. Doc. 369, *Comer v. Murphy*, No. 1:05-cv-00436-LG-RHW (S.D.Miss. filed Aug. 30, 2007).

[4] Rec. Doc. 370, *Comer v. Murphy*, No. 1:05-cv-00436-LG-RHW (S.D.Miss. filed Sept. 17, 2007).

[5] Docket, *Comer v. Murphy*, No. 07-60756 (5th Cir. filed Jan. 25, 2008) (briefing complete).

[6] Docket, *Comer*, No. 07-60756 (5th Cir. filed Aug. 6, 2008) (oral argument heard).

| | |
|---|---|
| 08/21/2008 | A panel member was disqualified, so a new panel was formed and oral arguments were rescheduled.[7] |
| 11/03/2008 | The parties presented oral arguments to three panel members.[8] |
| 10/16/2009 | The Fifth Circuit panel issued a 36-page decision reversing the district court's dismissal.[9] |
| 11/27/2009 | The appellees petitioned for rehearing en banc.[10] |
| 12/14/2009 | The Fifth Circuit ordered the appellants to respond to the application,[11] and the appellants complied.[12] |
| 02/26/2010 | Seven Circuit judges recused; six of the remaining nine judges voted to rehear the case en banc.[13] |

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[7] Docket, *Comer*, No. 07-60756 (5th Cir. filed Aug. 21, 2008) (calendared case continued).

[8] Docket, *Comer*, No. 07-60756 (5th Cir. filed Nov. 3, 2008) (oral argument heard).

[9] *Comer*, 585 F.3d 855 (5th Cir. 2009).

[10] Pet. by Appellees, *Comer*, No. 07-60756 (5th Cir. filed Nov. 27, 2009).

[11] Resp. Requested, *Comer*, No. 07-60756 (5th Cir. filed Dec. 2, 2009).

[12] Resp./Opp'n, *Comer*, No. 07-60756 (5th Cir. filed Dec. 14, 2009).

[13] Ct. Order, *Comer*, No. 07-60756, 598 F.3d 208 (5th Cir. filed Feb. 26, 2010) (granting petition for rehearing en banc); Ct. Order, *Comer*, No. 07-60756, 607 F.3d 1049 (5th Cir. filed May 28, 2010) ("Five Judge Order") App. at 6-7 (Davis, J. dissenting).

03/31/2010 The appellants filed a rehearing brief as ordered.[14]

04/06/2010 – 05/07/2010
Various amici filed briefs.

04/30/2010 The Fifth Circuit Clerk of Court issued a notice that an additional judge had recused herself, and the court had lost its quorum.[15]

05/06/2010 The Fifth Circuit Clerk requested the parties write letter briefs advising of the law in this situation.[16]

05/12/2010 The parties submitted their original letter briefs on the quorum issue.[17]

05/17/2010 The parties submitted their reply letter briefs.[18]

05/28/2010 Five judges issued an order *sua sponte* dismissing the appeal, with the panel members dissenting.[19]

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[14] Appellants Supplement Br., *Comer v. Murphy*, No. 07-60756 (5th Cir. filed Mar. 31, 2010).

[15] Docket, *Comer*, No. 07-60756 (5th Cir. filed Apr. 30, 2010) (en banc court has lost its quorum; calendared case continued).

[16] Letter of Advisement, *Comer*, No. 07-60756 (5th Cir. filed May 6, 2010) (requesting supplemental letter briefs).

[17] Letter by Appellants, *Comer*, No. 07-60756 (5th Cir. filed May 12, 2010); Letter by Appellee Shell Oil Co., *Comer*, No. 07-60756 (5th Cir. filed May 12, 2010).

[18] Letter by Appellee Shell Oil Co., *Comer v. Murphy*, No. 07-60756 (5th Cir. filed May 17, 2010); Letter by Appellants, *Comer*, No. 07-60756 (5th Cir. filed May 17, 2010).

After this case spent two and a half years at the Fifth Circuit, and after eight of the sixteen active circuit judges recused themselves, five non-recused judges decided *sua sponte* that, although they lacked any authority to act, they had authority to dismiss the entire appeal. The judges reasoned that "[t]he absence of a quorum . . . does not preclude the internal authority of the body to state the facts as they exist in relation to that body, and to apply the established rules to those facts."[20] They determined that the en banc court could not act, the properly constituted three-judge panel lacked the power to do anything further, and the panel opinion was vacated by a local rule. In so doing, they allowed the local rule to override the Petitioners' statutory right to appeal, and created a legal vacuum by permanently vacating the panel's decision.

The result is nothing short of a travesty. The district court's single-judge ruling stands, despite three Fifth Circuit judges reversing it, while six Fifth Circuit judges thought the issues were important enough to rehear the appeal en banc. This result is additionally bizarre because the district court judge had expressly told the litigants, when ruling from the bench, that the Fifth Circuit would be the appropriate

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[19] Five Judge Order at App. 1-32.

[20] Five Judge Order at App. 3.

body to review his ruling and that he would abide by the Fifth Circuit's opinion.[21]

After both the parties and the judiciary expended considerable time and resources – initial briefing, two panel arguments, briefing to the en banc court for rehearing, and briefing letters to the Clerk of Court on the quorum issue – the case has reverted to the district court's judgment.[22] There is no court of appeals decision addressing that judgment.

When the circuit court (although professedly lacking power to act at all) dismissed the case, the litigants were left without an adjudication of their appeal though they had followed all the applicable rules. This startling result occurred even though a three-judge panel – the only circuit judges to have spoken on the district court's judgment – had unanimously voted to overturn the district court's ruling. Under federal statutory requirements as well as due process and equal protection considerations, the Fifth Circuit should have reinstated the panel decision rather than dismiss the appeal.

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[21] *Comer*, No. 1:05-cv-00436-LG-RHW (S.D.Miss. Aug. 30, 2007).

[22] Judgment, Rec. Doc. 369, *Comer*, No. 1:05-cv-00436-LG-RHW (S.D.Miss. filed Aug. 30, 2007).

## ARGUMENT

### I. CIRCUIT COURTS HAVE A DUTY TO DECIDE APPEALS WITHIN THEIR JURISDICTION.

What unfolded was an egregious breakdown of regular procedure and fundamental fairness.

#### A. The Fifth Circuit had jurisdiction over the Petitioners' appeal.

Federal courts have an absolute duty to exercise jurisdiction once it has been conferred:

> "It is most true that this Court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the Constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given. The one or the other would be treason to the Constitution. Questions may occur which we would gladly avoid, but we

> cannot avoid them. All we can do is to exercise our best judgment and conscientiously to perform our duty."[23]

Congress conferred an appeal of right to litigants who, like Petitioners here, are the subject of adverse final decisions in the district courts.[24] Circuit courts are bound by statute and by the Due Process Clause to accord appellate rights Congress has conferred, as it has here. Under the U.S. Constitution,[25] litigants have a right to an appeal.

Here, the litigants followed the procedural rules, including the Rules of Appellate Procedure and the Local Rules. The five judges who dismissed the case never suggested that the Fifth Circuit lacked jurisdiction nor that there was some rule or law requiring dismissal.[26] Rather, the judges *sua sponte* determined that the court lacked authority to act, disregarding Petitioners' due process right to a decision of their properly filed and diligently prosecuted appeal.

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[23] *Cohens v. Virginia*, 19 U.S. 264, 404 (1821); *see also New Orleans Pub. Serv., Inc. v. Council of the City of New Orleans*, 491 U.S. 350, 358 (1989); *United States v. Will*, 449 U.S. 200, 213-16 (1980).

[24] *See* 28 U.S.C. § 1291; Fed. R. App. P. 3, 4.

[25] U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

[26] Five Judge Order at App. 6.

### B. The litigants have been treated unequally under the law.

All United States citizens are entitled to equal protection under the law.[27] Granting appellate review to some but arbitrarily denying it to others in the same situation violates equal protection principles.[28]

Fifth Circuit Local Rule 41.3, which automatically vacates the panel decisions when the en banc court grants rehearing, does not have an equivalent counterpart in most circuits.[29] Petitioners had their appeal dismissed because they filed their lawsuit in a circuit whose local rule vacates panel decisions upon granting an en banc rehearing, regardless of whether or not the en banc court ever intended to reverse the panel decision. If Petitioners had filed an identical suit in another circuit, the panel decision would not have been vacated. Faced with the effect of its Local Rule 41.3, the five judges felt that the best solution

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[27] U.S. CONST. amends. V & XIV, § 1; *Bolling v. Sharpe*, 347 U.S. 497 (1954) (applying the Fourteenth Amendment's Equal Protection principles to the federal government through the Fifth Amendment).

[28] *Griffin v. Illinois*, 351 U.S. 12, 37 (1956); *Lindsey v. Normet*, 405 U.S. 56, 77 (1972).

[29] Four U.S. Circuit Courts of Appeals have rules that automatically vacate the panel decision when rehearing is granted. 4th Cir. R. 35(c); 5th Cir. R. 41.3; 6th Cir. R. 35(a); 11th Cir. R. 35-11. Eight Circuit Courts do not. *See* Local R. for the 1st, 2nd, 3rd, 7th, 8th, 9th, D.C. and Fed. Cirs. Alternatively, the Tenth Circuit vacates the judgment but not the decision. 10th Cir. R. 35.6

was to just dismiss the entire appeal and revert to the district court decision, even though Federal Rule of Appellate Procedure 2 allows circuit courts to suspend their local rules "for good cause" (unless that suspension would extend the time to appeal).[30] Local Rule 41.3's operation and the five judges' dismissal arbitrarily denied these litigants their appeal, thereby violating equal protection of the laws afforded by the Constitution.

### C. The en banc court lacked a quorum, and therefore lacked the authority to act. Thus the *sua sponte* dismissal is void.

The five judge order states that the judges did not have authority to act, but they acted anyway. Because the Order dismissing the appeal was issued by a five-judge group without authority to conduct judicial business, it is void.[31] The dismissal order shows this contradiction on its face:

> "Upon this recusal, this en banc court lost its quorum. Absent a quorum, no court is authorized to transact judicial business. *See Nguyen v. United States*, 539 U.S. 69, 82 n.14 (2003) (quoting *Tobin v. Ramey*, 206 F.2d 505, 507 (5th Cir. 1953)).

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[30] Fed. R. App. P. 2, 26(b).

[31] *Pennoyer v. Neff*, 95 U.S. 714, 728 (1877); *Dynes v. Hoover*, 61 U.S. 65, 66 (1857).

> The absence of a quorum, however, does not preclude the internal authority of the body to state the facts as they exist in relation to that body, and to apply the established rules to those facts.
>
> In arriving at our decision, directing the clerk to dismiss this appeal, this en banc court has considered and rejected each of the following options: . . . ."[32]

But a circuit court's "internal authority" is insufficient to apply law to facts, and issue orders or render decisions. Applying law to the facts is exactly what courts need jurisdiction and authority to do.[33] Furthermore, it is the courts' duty to determine how to weigh and apply conflicting laws:

> "It is emphatically the province and duty of the Judicial Department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret that rule. If two laws conflict with each other, the Courts must decide on the operation of each. So, if a law be in opposition to the Constitution, if both the law and the Constitution apply to a particular case, so that the Court must either decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law, the Court must

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[32] Five Judge Order at App. 6.

[33] *See, e.g., Jacobellis v. State of Ohio*, 378 U.S. 184, 189 (1964); *Ex Parte State of Oklahoma*, 220 U.S. 210, 212 (1911).

> determine which of these conflicting rules governs the case. This is of the very essence of judicial duty."[34]

Federal judges can issue orders only when they have jurisdiction, and circuit court judges in particular can issue orders only through a properly constituted quorum of either a panel or an en banc court.[35] If the Fifth Circuit lacked an en banc quorum, then the five judge ad hoc group could not *sua sponte* issue dismissal orders. The en banc court either had authority to act or it did not. If it had authority to apply fact to law, it was obligated to decide the appeal. If it did not have such authority, it was barred from applying any law to any facts. It could not have it both ways.

Furthermore, the five judges did not merely apply "established rules" to the facts. They made specific and controversial interpretations of various legal arguments, over the panel members' objections. Because the Petitioners had a statutory right to an appeal, and the Fifth Circuit had a constitutional duty to decide that appeal, the very worst option was the one the five judges chose: dismissing the entire appeal, abrogating the court's judicial duty, and directing the litigants to appeal to this Court.

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[34] *Marbury v. Madison*, 5 U.S. at 174-78.

[35] With limited exceptions not relevant here, *see* Fed. R. App. P. 27(c).

### i. The Rules of Appellate Procedure and Local Rules do not authorize dismissal when the Circuit Court fails to establish an en banc quorum.

The Rules of Appellate Procedure allow the courts to dismiss appeals for certain listed reasons,[36] but those do not apply here. The litigants did everything they were supposed to do: they drafted their pleadings according to the guidelines, followed the court's orders, filed their pleadings on time, and paid their fees. No one has suggested that any litigant took any action that justifies dismissing this appeal. There is no Rule of Appellate Procedure, Local Rule, or Internal Operating Procedure supporting the decision to dismiss the appeal just because an en banc rehearing could not be completed.

### ii. There is no right to an en banc rehearing.

The five judges assumed that once the en banc court granted rehearing, the Fifth Circuit was powerless unless it could continue and complete the en banc rehearing process. There is no rule or law giving a litigant any right to an en banc rehearing, even after one tentatively has been granted. En banc rehearing is disfavored.[37] While on average U.S. circuit courts

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[36] Fed. R. App. P. 3 & 4.

[37] Fed. R. App. P. 35(a).

render 27,000 panel decisions each year, en banc courts decide only 75 cases annually.[38] The litigants were never vested with a substantive right to an en banc rehearing, and the five judges erred by dismissing the entire appeal when they learned they could not complete the en banc process.

### iii. There is no rule or law that stripped the panel of its authority to act.

The five judges also assumed that once the en banc court voted to grant rehearing, the panel lost authority to act. But the opinion cited no rule to support the assumption that the panel lost that authority.[39] Fifth Circuit Local Rule 41.3 automatically vacates a panel decision when an en banc rehearing is granted, but never mentions whether or not the panel loses its authority to take necessary action. The panel could have continued to exert the authority it had never lost, and could have reheard the case based on the new briefing, issuing a new decision or reinstating its previous decision. The five judges' drastic action, taken *sua sponte* and without authority, was unnecessary, because the Fifth Circuit still could act through the properly constituted three-judge panel.

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[38] Michael E. Solimine, *Due Process and En Banc Decisionmaking*, 48 ARIZ. L. REV. 325, 325 (2006).

[39] Five Judge Order at App. 2-6.

## II. A WRIT OF MANDAMUS IS THE PROPER REMEDY IN THIS CASE.

The public needs the circuit courts to function. There should be no set of circumstances under which a circuit court is so flummoxed that it cannot consider a case over which it has jurisdiction. Local rules and recusal standards simply cannot be applied in a way that disables a court of appeals or allows it to be easily manipulated. Fortunately, this Court can provide the Fifth Circuit with a roadmap to fulfill its duty. A writ of mandamus is appropriate because adequate relief cannot be obtained by another means, the circumstances are extraordinary, and the parties are entitled to the relief sought:[40]

> "It is a writ of most extensively remedial nature, and issues in all cases where the party has a right to have any thing done, and has no other means of compelling its performance."[41]

### A. This Court's mandamus power is the only proper remedy.

The five judges' statement that "[t]he parties, of course, now have the right to petition the Supreme

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[40] Sup. Ct. R. 20(1), 20(3); *Cheney v. U.S. District Court,* 542 U.S. 367, 380-81 (2004); *see also In re Volkswagen of America, Inc.,* 545 F.3d 304, 310-11 (5th Cir. 2008) (en banc).

[41] *Marbury v. Madison*, 5 U.S. at 147 (quoting William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND Vol. 3 at 110 (Oxford 1765-1769)).

Court of the United States,"[42] implies that the parties have a functional remedy if the Fifth Circuit's decision is incorrect. But this Court does not sit as a first-instance court of appeals, and instead hears only narrowly circumscribed categories of cases – categories that do not include cases for which the court of appeals did not reach a decision.[43] The circuit courts must perform the work they were created to do, and this Court has the authority to make sure that the circuit courts function:

> "The second section of the third article of the constitution gives this court appellate jurisdiction in all cases in law and equity arising under the constitution and laws of the United States (except the cases in which it has original jurisdiction) with such exceptions, and under such regulations, as congress shall make. The term 'appellate jurisdiction' is to be taken in its largest sense, and implies in its nature the right of superintending the inferior tribunals."[44]

The most proper use of this Court's writ of mandamus authority is "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to *compel it to exercise its authority when it has a duty to*

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[42] Five Judge Order at App. 6.

[43] *See* Sup. Ct. R. 10.

[44] *Marbury v. Madison*, 5 U.S. at 147.

*do so.*"[45] In this case, the five judge dismissal represents both an overreaching and a failure to exercise jurisdiction: the five judges had no authority to "[apply] the rules to the facts" and then dismiss this case, nor could the Fifth Circuit ignore the Petitioners' statutory right to an appeal and fail to do its judicial duty to adjudicate an appeal of right within its jurisdiction. Furthermore, mandamus is appropriate if the Petitioners are owed a nondiscretionary duty.[46] Here, the circuit court had a nondiscretionary duty to decide the Petitioners' appeal.

Additionally, judicial recusals caused the Fifth Circuit to lose its quorum. Recusals are a particularly proper issue for mandamus consideration, and the Fifth Circuit itself has repeatedly found that mandamus is appropriate to remedy an improper 28 U.S.C. § 455 recusal decision.[47] And every other federal circuit also uses mandamus to correct improper recusal

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[45] *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943) (emphasis added); *see also Cheney*, 542 U.S. at 380-81; *Will v. United States*, 389 U.S. 90, 95 (1967); *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 383 (1953); *Marbury v. Madison*, 5 U.S. at 148.

[46] *Cheney*, 542 U.S. at 381 & 392 (citing *Heckler v. Ringer*, 466 U.S. 602, 616 (1984)).

[47] *In re Faulkner*, 856 F.2d 716, 721 (5th Cir. 1988) (granting mandamus based on § 455(a) and § 455(b)(I)); *see also Davis v. Bd. of Sch. Comm'rs*, 517 F.2d 1044, 1051-52 (5th Cir. 1975) (explaining that 28 U.S.C. § 455 "is self-enforcing on the part of the judge" and that it may be enforced, *inter alia*, "by mandamus"); *Parrish v. Bd. of Comm'rs*, 524 F.2d 98, 102 & n.8 (5th Cir. 1975) (en banc) (quoting *Davis*).

the political question doctrine bar access to a judicial decision when the subject matter involves climate change? Because this case is being carefully watched by legal scholars, the public, and the media worldwide, it is important that federal courts maintain their high standards for fairness.

Furthermore, this case is unprecedented: the Petitioners could find no similar instance where a court of appeals utterly refused to hear an appeal of right. Under these extraordinary circumstances, mandamus is appropriate to correct the Fifth Circuit's erroneous *Comer* dismissal.

### C. The parties have a clear and indisputable right to have the Fifth Circuit's abuse of discretion corrected.

A "clear and indisputable right" to mandamus arises from a "clear abuse of discretion":[51]

> "[A writ of mandamus] is said to be a writ of discretion. But the discretion of a court always means a found, legal discretion, not an arbitrary will. If the applicant makes out a proper case, the courts are bound to grant it. They can refuse justice to no man."[52]

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[51] *Volkswagen,* 545 F.3d at 311; *Cheney,* 542 U.S. at 380-81 (2004); *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 383 (1953).

[52] *Marbury v. Madison*, 5 U.S. at 153.

The five judges below abused their discretion by acting without authority, and by denying the Petitioners their clear and indisputable right to an appeal of the adverse district court judgment.

Courts have no discretion to disregard the law.[53] A court abuses its discretion when it reaches an "erroneous legal conclusion" that causes a "patently erroneous" result.[54] The five judges not only had no authority to dismiss this case, but they also misinterpreted the law in *sua sponte* doing so. Thus, the Petitioners have a clear and indisputable right to mandamus in order to correct the bizarre and unconstitutional result below.

## III. THE FIFTH CIRCUIT HAS AN OBLIGATION TO REINSTATE AND DECIDE THE PETITIONERS' APPEAL.

The Fifth Circuit had several options for resolving its quorum issue. But five judges chose the least appropriate: throwing up their hands and completely dismissing the appeal. Although the parties disagreed on the best solution, any of the other options would have been less egregious.

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[53] *Volkswagen,* 545 F.3d at 310 ("As a general matter, a court's exercise of its discretion is not unbounded; that is, a court must exercise its discretion within the bounds set by relevant statutes and relevant, binding precedents.").

[54] *Volkswagen,* 545 F.3d at 310-11; *In re Ford Motor Co.,* 591 F.3d 406, 415 (5th Cir. 2009). *See generally, Cheney,* 542 U.S. 367.

### A. The Fifth Circuit should have vacated the order granting rehearing en banc.

Under the Fifth Circuit Internal Operating Procedures, the panel retained authority to act after the petition for rehearing en banc was filed:

> *Petition For Rehearing En Banc – Handling Of Petition By The Judges*
>
> *Panel Has Control* – Although each panel judge and every active judge receives a copy of the petition for rehearing en banc, the filing of a petition for rehearing en banc does not take the case out of the control of the panel deciding the case. A Petition for rehearing en banc is treated as a petition for rehearing by the panel if no petition is filed. The panel may grant rehearing without action by the full court.[55]

Local Rule 41.3 automatically vacated the opinion but did not divest the panel of authority to act:

> **41.3 Effect of Granting Rehearing En Banc.** Unless otherwise expressly provided, the granting of a rehearing en banc vacates the panel opinion and judgment of the court and stays the mandate.

In fact, no Federal Circuit Court has a rule that withdraws the panel's authority during the en banc

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[55] Rules and Internal Operating Procedures of the United States Court of Appeals for the Fifth Circuit at 35 (2009) (available at http://www.ca5.uscourts.gov/clerk/docs/5thCir-IOP.pdf).

rehearing process. The five judges who applied "established rules to [the] facts," stripped the panel of its ability to act, but cited no law or rule to support that action.[56] Furthermore, if they had the authority to dismiss the entire appeal, then they should have had the authority to vacate the order granting en banc rehearing.

The five judges erred when they stripped the panel of its authority to act and dismissed the appeal. This Court should instruct the Fifth Circuit to vacate the order granting rehearing en banc, at which point the three-member panel could exert the control it never actually lost. The panel may then issue a new decision based on the additional briefing that the parties and the *amici* filed, or reinstate its previous decision.

### B. Procedural Local Rule 41.3 cannot operate to permanently vacate a panel decision on an appeal of right.

Ironically the five judges found that they lacked the power to suspend a local procedural rule, yet had sufficient power to dismiss the Petitioners' statutory right to appeal, thereby preventing the Fifth Circuit from fulfilling its judicial duty. If the five judges had the authority to "apply the established rules to [the] facts,"[57] they should also have applied the

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[56] Five Judge Order at App. 6.

[57] Five Judge Order at App. 3.

longstanding precept that a local procedural rule cannot trump a constitutional right or a federal statute.[58]

When the Fifth Circuit granted en banc rehearing, it did not expressly vacate the panel decision in its Order. Rather, when the order granting the discretionary en banc rehearing was entered, Local Rule 41.3 by its own operation automatically "vacate[d] the panel opinion and judgment of the court." But the local rules should affect procedure, not substantive rights. Under Fed. R. App. P. 47, local rules must be consistent with Acts of Congress and the rules adopted under 28 U.S.C. § 2072. Because the en banc court cannot now replace the panel decision with a valid en banc decision, Rule 41.3 has effectively invalidated the appellants' right to appeal the district court's final decision. Therefore, Local Rule 41.3 is not consistent with the U.S. Constitution, 28 U.S.C. § 1291, and Fed. R. App. P. 3-4.

Under normal circumstances, the automatic-vacating rule ensures that the en banc court takes the proper procedural posture, so that everyone is on notice of the opinion's procedural and precedential status and so that the en banc court does not act as an appellate court over one if its own panels.[59] But this unique situation exposes the inherent risk in Local Rule 41.3: for the time between the grant of rehearing and a final en banc decision, the case has

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[58] Fed. R. App. P. 47; *Marbury v. Madison*, 5 U.S. at 178.

[59] Five Judge Order at App. 7 (Davis, J. dissenting).

no valid Fifth Circuit decision even though a panel has ruled. During this time, the procedural Rule 41.3 can impact substantive rights by reverting the case's outcome to the district court's decision. Under normal circumstances, this error is harmless once the en banc court enters a decision on the appeal. But here, because the en banc court could not proceed, the error is grave.

Under Fed. R. App. P. 47, Local Rule 41.3 should not overrule a substantive right to appeal and is invalid. The panel decision should still stand. In the alternative, Fed. R. App. P. 2 allows Courts to suspend local rules, and the Fifth Circuit should use this power to suspend Local Rule 41.3 and reinstate the panel's decision.

### C. The Fifth Circuit could have placed the case on a special docket until a vacancy could be filled.

When the five judges were drafting the decision, there was one vacancy at the Fifth Circuit. The parties briefed the possible solution of placing the case on a special docket to wait until a new judge could be confirmed, but the panel rejected this option:

> "It is purely speculative as to when the current vacancy on this court will be filled and it is, of course, unknown whether that judge may also be recused. Furthermore, we have no way of knowing when another sitting judge in regular active service of the Court may become "undisqualified" or indeed

> whether another judge of this en banc court may become disqualified to sit further. The Wright and Miller treatise has observed:
>
> 'Any decision of this character, however, should be made *as promptly as possible*; delay that spans several months and the addition of new judges, and that creates at least the appearance of a decision that could not have been reached earlier, *should be avoided at all costs*.'
>
> 16AA WRIGHT & MILLER § 3981.3, at 448 (2008) (emphasis added)."[60]

But Wright and Miller do not advocate dismissing the case rather than waiting for another judge to join the court. The treatise advises making a decision as quickly as possible; it does not recommend that if a decision cannot be made quickly, the court should just give up and toss the case altogether. The majority raised valid concerns – particularly the concern that a new judge might also be disqualified. After this decision was filed, however, the President nominated a judge to fill the Fifth Circuit vacancy.[61] It is not unreasonable to wait until a new judge is confirmed

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[60] Five Judge Order at App. 5.

[61] *See* Office of the Press Secretary, The White House, *President Obama Names James E. Graves, Jr. to U.S. Court of Appeals* (for immediate release June 10, 2010), http://www.whitehouse.gov/the-press-office/president-obama-names-james-e-graves-jr-us-court-appeals (last visited 19 August 2010).

to see if the en banc court can then act; it is a better option than denying the parties' rights completely.

### D. The Fifth Circuit does not need to rely on other suggested options.

The Fifth Circuit may have asked the Chief Justice to appoint a judge from another circuit to temporarily sit on the Fifth Circuit to reconstitute a quorum, but this option apparently violates separation of powers. Functionally, the temporary judge would be filling a vacancy by judicial appointment, rather than by presidential appointment with the advice and consent of the senate.[62] This option also violates the purpose of the en banc rehearing, which is for all of the judges in that circuit to come to a decision on what the law is *in that circuit*. Circuit court judges do not operate in a vacuum, but rather engage in sometimes complicated and ongoing discussions in order to reach a consensus.[63] It would not be appropriate for a judge from another circuit to join the en banc court and help decide what the law will be in the Fifth Circuit.

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[62] U.S. CONST. art. II, § 2.

[63] Michael E. Solimine, *Due Process and En Banc Decision-making*, 48 ARIZ. L. REV. 325 (2006); Maxwell L. Stearns, *Appellate Courts Inside and Out*, 101 MICH. L. REV. 1764 (2003); Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639 (2003); Bernard E. Nodzon, Jr., *A Closer Look Inside Appellate Courts*, 29 WM. MITCHELL L. REV. 729 (2002).

Yet another suggestion was that the Fifth Circuit should transplant language from Federal Rule of Appellate Procedure 35 into the 28 U.S.C. § 46 quorum requirement. This would redefine a quorum as a "majority of judges *not disqualified*," rather than a majority of judges in regular active service. Under this novel interpretation of "quorum," one member of the court, if she were the only member not disqualified, would be empowered to issue an en banc decision on behalf of the Fifth Circuit. A decision issued under such an interpretation would lack any judicial authority.[64] The five judges properly rejected this option:

> **Declaring that there is a quorum under the provisions of Federal Rule of Appellate Procedure 35(a).** We believe that a quorum is properly defined under 28 U.S.C. § 46 as constituting a majority of the judges of the entire court who are in regular active service, and not as a body of the non-recused judges of the court, however few.[65]

The quorum requirement should not be read in a way that allows only a minority of active judges to participate in an en banc rehearing.

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[64] Jonathan Remy Nash, *The Majority That Wasn't: Stare Decisis, Majority Rule, and the Mischief of Quorum Requirements*, 58 EMORY L.J. 831 (2009).

[65] Five Judge Order at App. 3-4.

It was also suggested that the Fifth Circuit ignore the recusals under the rule of necessity. Our current recusal laws are strict in order to prevent both impropriety and the appearance of impropriety.[66] But courts cannot ignore the importance of retaining the highest possible level of judicial impartiality.[67] By federal statute, a judge who knows he "has a financial interest in the subject matter in controversy or in a party to the proceeding" is disqualified.[68] The statute is mandatory. According to its plain language, a judge who possesses such a financial interest "shall disqualify himself."[69]

Under the rule of necessity, a court of last resort may need to decide an issue even though the judges have a pecuniary interest in the outcome.[70] But the rule of necessity should only apply where courts have a duty to render a decision, not to discretionary en banc rehearings.[71] The Fifth Circuit may now have an en banc quorum given the recent judicial appointment; regardless, it already has a properly constituted three-judge panel that has jurisdiction and can render a decision. It makes no sense to apply the rule of necessity to force an unnecessary en banc

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[66] *See* 28 U.S.C. § 455.

[67] *See Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009).

[68] 28 U.S.C. § 455.

[69] *Id.*

[70] *See United States v. Will*, 449 U.S. 200, 211-216 (1980).

[71] *Id.*

rehearing, especially if that requires allowing recused judges to rejoin the en banc court and participate in a decision that may affect their financial interests.

## IV. THIS COURT SHOULD ISSUE A WRIT OF MANDAMUS DIRECTING THE FIFTH CIRCUIT, IF IT STILL LACKS AN EN BANC QUORUM, TO REINSTATE THE APPEAL AND RETURN IT TO THE PANEL.

Because the petitioners have a statutory and constitutional right to have their appeal heard, they ask this Court to order the U.S. Court of Appeals for the Fifth Circuit to reinstate their appeal, so that their right may be honored. If the Fifth Circuit still lacks a quorum to rehear the case en banc, the petitioners ask this Court to order the Fifth Circuit to vacate the order granting rehearing en banc and return the case to the three-judge panel to decide the appeal.

Respectfully submitted,

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**IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

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No. 07-60756

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NED COMER; BRENDA COMER; ERIC HAYGOOD, husband of Brenda Haygood; BRENDA HAYGOOD; LARRY HUNTER, husband of Sandra L. Hunter; SANDRA L. HUNTER; MITCHELL KISIELWESKI, husband of Johanna Kisielweski; JOHANNA KISIELWESKI; ELLIOTT ROUMAIN, husband of Rosemary Roumain; ROSEMARY ROUMAIN; JUDY OLSON; DAVID LAIN,

Plaintiffs-Appellants,

v.

MURPHY OIL USA; UNIVERSAL OIL PRODUCTS (UOP); SHELL OIL COMPANY; EXXONMOBIL CORP.; AES CORP.; ALLEGHENY ENERGY, INC.; ALLIANCE RESOURCE PARTNERS LP; ALPHA NATURAL RESOURCES, INC.; ARCH COAL, INC.; BP AMERICA PRODUCTION COMPANY; BP PRODUCTS NORTH AMERICA, INC.; CINERGY CORP.; CONOCOPHILLIPS COMPANY; CONSOL. ENERGY, INC.; THE DOW CHEMICAL COMPANY; DUKE ENERGY CORP.; EON AG; E.I. DUPONT DE NEMOURS & CO.; ENTERGY CORP.; FIRSTENERGY CORP.; FOUNDATION COAL HOLDINGS, INC.; FPL GROUP, INC.; HONEYWELL INTERNATIONAL, INC.; INTERNATIONAL COAL GROUP, INC.; MASSEY ENERGY CO.; NATURAL RESOURCE PARTNERS LP; PEABODY ENERGY

CORP.; RELIANT ENERGY, INC.; TENNESSEE VALLEY AUTHORITY; WESTMORELAND COAL CO.; XCEL ENERGY, INC.; CHEVRON USA, INC.; THE AMERICAN PETROLEUM INSTITUTE,

Defendants-Appellees.

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Appeal from the United States District Court
for the Southern District of Mississippi

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(Filed May 28, 2010)

Before JOLLY, Acting Chief Judge, and DAVIS, SMITH, STEWART, DENNIS, CLEMENT, PRADO and OWEN, Circuit Judges.*

ORDER:

This case was voted en banc by a duly constituted quorum of the court consisting of nine members in regular active service who are not disqualified. Fed. R. App. P. 35(a); 28 U.S.C. § 46(d).

The grant of rehearing en banc in this case "vacate[d] the panel opinion and judgment of the court and stay[ed] the mandate." 5th Cir. R. 41.3.; *see also Thompson v. Connick,* 578 F.3d 293 (5th Cir. 2009) (en banc) (same).

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* Chief Judge Jones and Judges King, Wiener, Garza, Benavides, Elrod, Southwick, and Haynes are recused.

After the en banc court was properly constituted, new circumstances arose that caused the disqualification and recusal of one of the nine judges, leaving only eight judges in regular active service, on a court of sixteen judges, who are not disqualified in this en banc case. Upon this recusal, this en banc court lost its quorum. Absent a quorum, no court is authorized to transact judicial business. *See Nguyen v. United States,* 539 U.S. 69, 82 n.14 (2003) (quoting *Tobin v. Ramey,* 206 F.2d 505, 507 (5th Cir. 1953)).

The absence of a quorum, however, does not preclude the internal authority of the body to state the facts as they exist in relation to that body, and to apply the established rules to those facts.

In arriving at our decision, directing the clerk to dismiss this appeal, this en banc court has considered and rejected each of the following options:

1. *Asking the Chief Justice to appoint a judge from another Circuit pursuant to 28 U.S.C. § 291.* We have rejected this argument as precluded by our precedent, *United States v. Nixon,* 827 F.2d 1019 (5th Cir. 1987), and because § 291 provides an inappropriate procedure, unrelated to providing a quorum for the en banc court of a circuit.

2. *Declaring that there is a quorum under the provisions of Federal Rule of Appellate Procedure 35(a).* We believe that a quorum is properly defined under 28 U.S.C. § 46 as constituting a majority of the judges of the entire court who are in regular active

service, and not as a body of the non-recused judges of the court, however few.

3. *Adopting the Rule of Necessity.* The Rule of Necessity – allowing disqualified judges to sit – is not applicable in this case because it would be inappropriate to disregard the disqualification of the judges of this Court when the appeal may be presented to the Supreme Court of the United States for decision. Moreover, there is no established rule providing that an en banc court lacking a quorum, may disregard recusals and disqualifications of all judges so that an en banc court may be formed. Nor is there any method to select one particular judge among the several disqualified judges in order to provide a bare minimum for a quorum.

4. *"Dis-enbancing" the case and ordering the panel opinion reinstated, and issuing the mandate thereon.* This case was properly voted en banc. The panel opinion and the judgment of the panel were lawfully vacated. Without a quorum to conduct any judicial business, this en banc court has no authority to rewrite the established rules of the Fifth Circuit for this one case and to order this case, properly voted en banc, "dis-enbanced." Moreover, we have no authority to interpret a plainly applicable rule as simply a blank, on grounds that "it was not designed to apply" to a situation where its terms have undisputed application.

> 5. *Holding the case in abeyance until the composition of the court changes.* It is purely speculative as to when the current vacancy on this court will be filled and it is, of course, unknown whether that judge may also be recused. Furthermore, we have no way of knowing when another sitting judge in regular active service of the Court may become "undisqualified" or indeed whether another judge of this en banc court may become disqualified to sit further. The Wright and Miller treatise has observed:
>
> > Any decision of this character, however, should be made *as promptly as possible*; delay that spans several months and the addition of new judges, and that creates at least the appearance of a decision that could not have been reached earlier, *should be avoided at all costs.*
>
> 16AA WRIGHT & MILLER § 3981.3, at 448 (2008) (emphasis added).

In sum, a court without a quorum cannot conduct judicial business. This court has no quorum. This court declares that because it has no quorum it cannot conduct judicial business with respect to this appeal. This court, lacking a quorum, certainly has no authority to disregard or to rewrite the established rules of this court. There is no rule that gives this court authority to reinstate the panel opinion, which has been vacated. Consequently, there is no opinion

or judgment in this case upon which any mandate may issue. 5TH CIR. R. 41.3.

Because neither this en banc court, nor the panel, can conduct further judicial business in this appeal, the Clerk is directed to dismiss the appeal.

The right of individual judges to write further after entry of this Order is preserved.

The parties, of course, now have the right to petition the Supreme Court of the United States.

This, the 28th day of May, 2010.

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Judge Davis dissents with reasons, joined by Judge Stewart. Judge Dennis dissents with reasons.

W. EUGENE DAVIS, Circuit Judge, joined by CARL E. STEWART, Circuit Judge, Dissenting.

I dissent from the order dismissing this appeal for the following reasons.

As the order states, we do not have a quorum of the court to act in this case. By way of background, a panel of this court, after full consideration of the briefs and oral argument, decided appellant's appeal. Appellee then applied for en banc rehearing and a vote was taken. Only nine of the seventeen active judges were unrecused and qualified to participate in a vote. By 6 to 3, the nine qualified judges voted to grant rehearing en banc. Shortly after the case was voted en banc, one of the six judges voting for en banc

declared herself recused thereby causing the court to lose its quorum. Instead of declaring that the loss of a quorum automatically dis-enbanced the case causing the case to return to its status before it was voted en banc, five of the eight remaining unrecused judges voted to enter the attached order dismissing the appeal. The five judges who entered this order reasoned that this result was mandated by our Local Rule 41.3, which provides: "Unless otherwise expressly provided, the granting of a rehearing en banc vacates the panel opinion and judgment of the court and stays the mandate."

1. Local Rule 41.3 was never designed to apply in this situation where the court, after voting a case en banc, loses its quorum and the en banc court never considers the appeal on its merits. It is a provisional, practical rule that alerts practitioners and courts of the fact that the panel opinion is not precedential pending consideration of the merits of the case by the en banc court.

It makes no sense to allow a vote to take a case en banc to dictate the result on the merits. Judges vote for en banc consideration for any number of reasons other than the fact that they conclude that the panel has reached an erroneous result. They may vote for en banc simply because they believe it presents a serious question that the full court should consider or simply because they have some question about the correctness of the result. Judges are rarely prepared to definitively decide the merits of the case

when they vote for or against en banc reconsideration.

2. Appellants in this case have a statutory right to appeal the adverse judgment of the district court to this court. The dismissal of this appeal based on a local rule has the effect of depriving appellants of their right to an appeal and allows the local rule to trump federal statutes.

3. Moreover, I find an inexplicable disconnect between the notion that a majority of the eight unrecused judges has no authority to do anything except literally apply our Local Rule 41.3 strictly as written; yet they do have the authority to dismiss the appeal.

4. Alternatively, 28 U.S.C. § 291 provides an avenue that would avoid depriving appellant of his direct appeal. Section 291 permits the Chief Justice to appoint a judge from another circuit to allow this court to have a quorum to consider the case en banc. 28 U.S.C. § 291 provides that: "(a) the Chief Justice of the United States may, in the public interest, designate and assign temporarily any circuit judge to act as circuit judge in another circuit upon request of the chief judge or circuit justice of such circuit." Acting Chief Judge E. Grady Jolly indicated his willingness to request the Chief Justice to designate such a temporary judge if a majority of the eight judges had requested it. We are aware that it would be an unusual request to appoint a judge from another circuit to constitute a quorum of the en banc court but we

believe such a request is justified here where the alternative is the appellant must completely lose his right to a direct appeal.

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DENNIS, Circuit Judge, dissenting:

I respectfully dissent from the decision by the majority of this en banc court to refuse to hear oral argument or to decide this appeal on its merits, but to take the shockingly unwarranted actions of ruling that the panel decision has been irrevocably vacated and dismissing the appeal without adjudicating its merits. The majority's decision to declare that we no longer have a quorum, and to take the drastic action of dismissing the appeal without hearing its merits, but with the intention of reinstating the district court's judgment, is manifestly contrary to law and Supreme Court precedents. The majority's action is deeply lamentable because it was forewarned of the reasons militating against its erroneous rush to judgment by the parties' letter briefs and by internal memoranda. If the five-judge en banc majority's precipitous summary dismissal of the appeal is not corrected, it will cause the sixteen-active judge body of this United States Court of Appeals to default on its absolute duty to hear and decide an appeal of right properly taken from a final district court judgment.

The majority's order mischaracterizes itself as merely stating the facts and "apply[ing] the established rules to those facts." In truth, however, the majority is making the fully informed *choice* to dismiss

this unadjudicated appeal and finally terminate this litigation, even while turning a blind eye to several legally viable alternative courses of action and claiming to have no power to take any further action in the case due to the supposed lack of a quorum.[1]

The majority's decision to dismiss this appeal rests, first of all, on an implausible interpretation of the statute that defines a quorum of an en banc court of appeals, 28 U.S.C. § 46(c)-(d). Second, it contravenes the long-established rule that "federal courts lack the authority to abstain from the exercise of jurisdiction that has been conferred." *New Orleans Public Service, Inc. v. Council of the City of New*

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[1] The language of the order of dismissal underscores the contradiction inherent in issuing such an order while simultaneously claiming to lack the power to take any action in this case. The order asserts the authority "to state the facts as they exist . . . and to apply the established rules to those facts." But United States circuit judges have no independent authority to apply law to facts and issue orders thereupon. We can issue orders only through a properly constituted quorum (with limited exceptions not relevant here, *see* Fed. R. App. P. 27(c)). A quorum is "the minimum number of members . . . who must be present for a deliberate assembly to legally transact business." *Black's Law Dictionary* (8th ed. 2004).

If we lack a quorum, then the group of judges who are purporting to issue the order of dismissal cannot issue such an order any more than a single circuit judge can dismiss a case on behalf of a three-judge panel.

I believe that we do have a quorum under 28 U.S.C. § 46 and must decide the appeal, but since the majority believes we lack a quorum, they contradict themselves by asserting that they have the power to dismiss the case.

*Orleans,* 491 U.S. 350, 358 (1989). There are several affirmative grounds that authorize us to fulfill "the absolute duty of judges to hear and decide cases within their jurisdiction." *United States v. Will,* 449 U.S. 200, 215 (1980). These grounds are as follows: (1) we do have a quorum under the correct reading of § 46(c)-(d), which is also supported by Fed. R. App. P. 35(a); (2) the acting chief judge of this court has the authority to seek the designation and assignment of a judge from another circuit under 28 U.S.C. §§ 291 & 296; (3) we can follow the Supreme Court's example in *North American Co. v. SEC,* 320 U.S. 708 (1943), and hold the case over until the President and the Senate fill this court's current vacancy and give us nine out of seventeen active judges who can decide the case; and if all else fails, (4) we should comply with the ancient common-law doctrine known as the Rule of Necessity, which overrides the federal statute governing judicial recusals, as the Supreme Court held in *Will,* 449 U.S. at 217. The Rule of Necessity, and not dismissal, is the appropriate last resort in this situation because it fulfills this court's absolute duty to decide cases within its jurisdiction. The majority's action flouts that duty.

Last but not least, the dismissal of this appeal – with the apparent intention to effectively reinstate the district court's order dismissing the case, even though a panel of this court has already held that the district court erred, 585 F.3d 855 (5th Cir. 2009) – is contrary to common sense and fairness. Indeed, it is injudiciously mechanistic and arbitrary. For example,

if the most recently recused judge had become recused three months earlier, the outcome of this case would have been precisely the opposite: the court could not have granted rehearing en banc (at least not while following the majority's current definition of an en banc quorum), so the panel's decision reversing the district court's dismissal of the case would have remained in effect. Thus, because of the majority's erroneous interpretation of 28 U.S.C. § 46(c)-(d) and its refusal to discharge this court's absolute duty to decide cases within its jurisdiction, the particular timing of one single judge's recusal is being allowed to conclusively determine the outcome of this case.[2]

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[2] I agree with almost all of Judge Davis's dissent, including his well-considered view that if the en banc court lacks a quorum, then it is effectively dissolved and Fed. R. App. P. 41(d)(1) requires the panel's mandate to issue notwithstanding anything in our local rules to the contrary. The panel's decision is the most recent and authoritative decision concerning the issues raised in this appeal; that decision, not the district court's overruled decision, should control if the en banc court is unable to act.

Despite my agreement with Judge Davis, at some points in this opinion I will assume for the sake of argument that the panel's decision has been irrevocably vacated under 5th Cir. R. 41.3 and that its mandate cannot issue.

My only point of disagreement with Judge Davis concerns his view that the en banc court lacks a quorum. As I explain herein, that view is based on an erroneous reading of 28 U.S.C. § 46.

## I. FACTS

The district court dismissed this case on the grounds that the plaintiffs lacked standing and that the case presented a nonjusticiable political question. The plaintiffs filed their notice of appeal in September 2007. The case was assigned to a three-judge panel of this court. Oral argument was held before a quorum of two judges because the third judge had a family emergency. One of the two remaining judges then recused himself, depriving the panel of a quorum. The case was then rescheduled for oral argument before a second three-judge panel. That panel issued its ruling in October 2009, reversing the district court's dismissal of the case. 585 F.3d 855 (5th Cir. 2009).

The defendants-appellees petitioned for rehearing en banc. The nine active circuit judges who were not recused at that time granted rehearing en banc by a vote of six to three. 598 F.3d 208 (5th Cir. 2010). Then, in April 2010, one of those nine judges became recused, leaving eight out of sixteen active judges still able to participate in the case, and forcing the eight nondisqualified judges to decide whether we still have a quorum and, if not, what is to be done. We asked the parties to submit letter briefs on the issue. Now, a majority of the nondisqualified judges – five out of eight – have voted to dismiss the case.

## II. ANALYSIS

### A. This en banc court has a quorum as defined by 28 U.S.C. § 46.

The majority's reading of the statutory quorum requirement as requiring nine out of sixteen active judges for an en banc quorum is erroneous. 28 U.S.C. § 46(c) defines an en banc court as follows: "A court in banc shall consist of all circuit judges in regular active service," with certain exceptions that are not relevant here. The majority reads "all circuit judges in regular active service" as including judges who are disqualified from taking part in a particular case. But if it really meant that, then the statute would necessarily require all disqualified active judges to sit as part of the en banc court in every case that is heard or reheard en banc.[3] However, no one thinks that Congress wanted to require disqualified judges to sit in en banc cases, so we do not read the statute that way. Instead, we routinely conduct en banc hearings and rehearings while excluding disqualified judges. Thus, our ordinary understanding of the category "all circuit judges in regular active service" excludes disqualified judges.

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[3] This seemingly self-evident point is also made by the Advisory Committee Notes to the 2005 amendment to Fed. R. App. P. 35(a): "It is clear that 'all circuit judges in regular active service' in the second sentence [of § 46(c)] does not include disqualified judges, as disqualified judges clearly cannot participate in a case being heard or reheard en banc."

The statute goes on to define a quorum as "[a] majority of the number of judges authorized to constitute a court or panel thereof, as provided in paragraph (c)." *Id.* § 46(d). Thus, a quorum of an en banc court is a majority of "all circuit judges in regular active service," a category that has to exclude disqualified judges because the alternative would be absurd. Therefore, in this case, "all circuit judges in regular active service" under § 46(c) simply means the eight judges who are not disqualified, and a quorum is a majority of those judges.[4]

That has always been the most logical reading of the statute. The 2005 amendment to Fed. R. App. P. 35(a)[5] effectively did away with our circuit's former

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[4] This reading of the statute does not render the quorum requirement meaningless; it only defines a quorum as a majority of the nondisqualified active judges. A majority of the qualified active judges still must be present in order for the court to conduct business. Thus, a quorum can be lost through circumstances other than disqualification, such as illnesses or family emergencies that may render judges temporarily unable to participate.

[5] The 2005 amendment clarified that only a majority of nondisqualified judges is needed in order to vote a case en banc. The history and reasons behind it are explained in the Advisory Committee Notes. The amended version of Rule 35(a) adopts a uniform national interpretation of § 46(c) and requires us to read the phrase "the circuit judges of the circuit who are in regular active service" in the first sentence of § 46(c) to *exclude* disqualified judges. Nonetheless, the majority in this case insists on reading the phrase "all circuit judges in regular active service" in the second sentence of § 46(c) to *include* disqualified judges.

version of a local rule, 5th Cir. R. 35.6, which had followed a contrary reading.[6] After the 2005 amendment was passed, we did not adopt a rule (like those the First, Third, and Federal Circuits have adopted) defining a quorum for conducting en banc court business as a majority of all active judges including disqualified judges.[7] Despite the absence of any such rule in this circuit, the majority is proceeding as if we actually had a local rule defining a quorum as a majority of all active judges including disqualified judges. Because we have no such rule, we must instead simply follow the statute itself, which requires only a majority of nondisqualified judges to constitute a quorum.

The majority's erroneous interpretation of § 46(c) is simply inconsistent with our routine practice of excluding disqualified judges from participating in rehearing en banc. We should accept that we have a quorum, as defined by § 46(c)-(d), and decide the case.

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[6] The pre-2005 version of 5th Cir. R. 35.6 said, "Judges in regular active service who are disqualified for any reason or who cannot participate in the decision of an en banc case nevertheless shall be counted as judges in regular active service."

[7] *See* 1st Cir. R. 35.0(a); 3d Cir. I.O.P. 9.5.3; Fed. Cir. R. 47.11. Such local rules appear to be permitted by the final paragraph of the Advisory Committee Notes to the 2005 amendment to Rule 35(a), which states, "the amendment is not intended to foreclose the possibility that § 46(d) might be read to require that more than half of all circuit judges in regular active service be eligible to participate in order for the court to hear or rehear a case en banc."

### B. The dismissal of this case violates the rule that federal courts have an absolute duty to render decisions in cases over which they have jurisdiction.

*1. The Absolute Duty to Decide Cases*

The Supreme Court's "cases have long supported the proposition that federal courts lack the authority to abstain from the exercise of jurisdiction that has been conferred. For example: 'We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution.'" *New Orleans Pub. Serv., Inc. v. Council of the City of New Orleans,* 491 U.S. 350, 358 (1989) (quoting *Cohens v. Virginia,* 19 U.S. 264, 404 (1821)). There is a good reason why this rule has been in place for two centuries: society depends on the courts to resolve disputes in accordance with the laws.[8] The political branches should be able to count on the federal courts to decide *all* the cases over which they have been given jurisdiction.[9] This court has jurisdiction over this case

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[8] "Law . . . must resolve disputes finally and quickly." *Daubert v. Merrell Dow Pharm., Inc.,* 509 U.S. 579, 597 (1993). "The province of the court is, solely, to decide on the rights of individuals. . . ." *Marbury v. Madison,* 5 U.S. 137, 170 (1803). "The fundamental role of the courts is to resolve concrete and present disputes between parties." *Principal Life Ins. Co. v. Robinson,* 394 F.3d 665, 671 (9th Cir. 2005).

[9] "Only Congress may determine a lower federal court's subject-matter jurisdiction." *Kontrick v. Ryan,* 540 U.S. 443, 454 (2004). "[T]he judicial power of the United States . . . is (except in enumerated instances, applicable exclusively to [the Supreme]

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because it is an appeal from a final order of a federal district court, in a suit between parties from different states, in which more than $75,000 is at stake. *See* 28 U.S.C. §§ 1291, 1332. The majority does not and cannot deny that this court has jurisdiction[10] – yet it chooses not to exercise that jurisdiction, in the face of two centuries of jurisprudence dating back to Chief Justice Marshall.[11]

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Court) dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating the tribunals (inferior to the Supreme Court) . . . and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good." *Ankenbrandt v. Richards*, 504 U.S. 689, 698 (1992) (quoting *Cary v. Curtis*, 44 U.S. 236, 245 (1845)).

[10] *See United States v. Will*, 449 U.S. 200, 211 (1980) (explaining that the federal statute governing judicial recusals, 28 U.S.C. § 455, "does not affect the jurisdiction of a court").

Because this appeal involves the standing and political question doctrines, one side argues that the federal courts ultimately do not have jurisdiction over this case. Nonetheless, there is no doubt that the panel had jurisdiction and that we still have jurisdiction to decide this appeal, because "it is familiar law that a federal court always has jurisdiction to determine its own jurisdiction." *United States v. Ruiz*, 536 U.S. 622, 628 (2002).

[11] *E.g., Marshall v. Marshall*, 547 U.S. 293, 298-99 (2006) ("Chief Justice Marshall famously cautioned: 'It is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should. . . . We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.'" (quoting *Cohens*, 19 U.S. at 404)); *Pierson v. Ray*, 386 U.S. 547, 554 (1967) ("It is a

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Just as courts have an "absolute duty . . . to hear and decide cases within their jurisdiction," *United States v. Will,* 449 U.S. 200, 215 (1980), litigants have a corresponding due process right to have their cases decided when they are properly before the federal courts. "The parties to a civil action may appeal 'as a matter of right' under Fed. R. App. P. 3 from the final judgment of a district court to the circuit court of appeals except where direct review may be had in the Supreme Court." *Matter of McLinn,* 739 F.2d 1395, 1398 (9th Cir. 1984) (en banc). "The right of appeal is statutory, and the grant is subject to due process requirements." *United States v. DeLeon,* 444 F.3d 41, 58 (1st Cir. 2006) (citing *Evitts v. Lucey,* 469 U.S. 387, 393 (1985)). The right to appeal would be of little value if the courts of appeals were not required to render decisions in cases that are properly brought before them.

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judge's duty to decide all cases within his jurisdiction that are brought before him. . . . "); *Kline v. Burke Const. Co.,* 260 U.S. 226, 234 (1922) ("[The plaintiff] had the undoubted right . . . to invoke the jurisdiction of the federal court and that court was bound to take the case and proceed to judgment."); *Willcox v. Consol. Gas Co. of N.Y.,* 212 U.S. 19, 40 (1909) ("When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction. . . ."); *Chicot County v. Sherwood,* 148 U.S. 529, 534 (1893) ("[T]he courts of the United States are bound to proceed to judgment and to afford redress to suitors before them in every case to which their jurisdiction extends.") (quoting *Hyde v. Stone,* 61 U.S. 170, 175 (1857)).

This court initially fulfilled its duty to decide this case when the panel rendered its decision in this appeal. 585 F.3d 855 (5th Cir. 2009). If the panel's decision had been allowed to take effect, then the court's duty would have been discharged.[12] But the court's decision to rehear the case en banc had the effect of vacating the panel's decision under Fifth Circuit Rule 41.3.[13] Because the panel's decision has been vacated, the court is now back in the position it was in before the panel rendered its decision: it has an absolute duty to hear and decide the appeal. The only difference is that now the en banc court, rather than the panel, has control over the case and therefore has the duty to render a decision.

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[12] If the court had believed it could not grant rehearing en banc due to lack of a quorum, there would have been no violation of the court's duty or of the parties' rights because there is no statutory or constitutional right to rehearing en banc. *See United States v. Nixon*, 827 F.2d 1019, 1022 (5th Cir. 1987) (per curiam).

[13] I agree with Judge Davis's reading of Rule 41.3, under which the panel's decision should be treated as having been only provisionally vacated pending the outcome of rehearing en banc, and the panel's mandate should therefore issue pursuant to Fed. R. App. P. 41(d)(1) because of the dissolution of the en banc court.

Here, however, I nonetheless assume for the sake of argument that we should treat the panel's decision as having been vacated.

*2. The Rule of Necessity*

Assuming for the sake of argument that the en banc court lacks a quorum, and also assuming that all other possible means of carrying out this court's duty have been ruled out, this court's last resort should be to decide that the Rule of Necessity applies and, accordingly, ask the active circuit judges who have recused themselves from this case to consider setting aside their recusals in order to decide this appeal. The Supreme Court in *United States v. Will* explained the Rule of Necessity as follows: it is the "well-settled principle at common law that . . . 'although a judge had better not, if it can be avoided, take part in the decision of a case in which he has any personal interest, yet he not only may but must do so if the case cannot be heard otherwise.'" 449 U.S. at 213 (quoting Frederick Pollock, *A First Book of Jurisprudence* 270 (6th ed. 1929)). The Court held in *Will* that the Rule of Necessity overrides the federal statute providing for the disqualification of judges, 28 U.S.C. § 455. *Id.* at 217 ("We therefore hold that § 455 was not intended by Congress to alter the time-honored Rule of Necessity."). If there is no other way for this court to carry out its duty, then we are required to follow *Will* and recognize that the Rule of Necessity requires some or all of our fellow active circuit judges to set aside their recusals.

As the Court explained in *Will,* the Rule of Necessity arises directly from the rule that federal courts cannot decline to exercise their jurisdiction:

> Chief Justice Marshall's exposition in *Cohens v. Virginia* could well have been the explanation of the Rule of Necessity; he wrote that a court "must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by, because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. *We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.* The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid; but we cannot avoid them."

*Id.* at 216 n.19 (citation omitted) (quoting *Cohens*, 19 U.S. at 404). Moreover, the Rule goes back more than five centuries, *id.* at 213, and "has been consistently applied in this country in both state and federal courts," *id.* at 214.

The Rule of Necessity is often invoked when every judge, or all the judges of a particular court, would otherwise be disqualified. For example, *Will* involved a challenge to the validity of statutes that affected the salaries of all federal judges, *see id.* at 209-10, and the Second Circuit applied the Rule in *Tapia-Ortiz v. Winter* when a litigant had sued every judge in the circuit, 185 F.3d 8, 10 (2d Cir. 1999) (per curiam). But the Rule is not limited to such extreme cases; it also applies to situations in which even a

single judge's disqualification would have the effect of preventing a properly brought case from being heard. This point is clearly established by the Supreme Court's opinion in *Will* and the cases quoted and cited therein.

For instance, the *Will* Court approvingly quoted the following passage from a Kansas Supreme Court case in which only one justice's disqualification was at issue:

> [I]t is well established that actual disqualification of *a member* of a court of last resort will not excuse *such member* from performing his official duty if failure to do so would result in a denial of a litigant's constitutional right to have a question, properly presented to such court, adjudicated.

*Will*, 449 U.S. at 214 (emphasis added) (quoting *State ex rel. Mitchell v. Sage Stores Co.*, 143 P.2d 652, 656 (Kan. 1943)). The disqualification issue in *Mitchell* was that one justice had previously been involved in the case while serving as the state's attorney general.[14]

*Will* also gave the example of "*Mooers v. White*, 6 Johns. Ch. 360 (N.Y.1822), [in which] Chancellor Kent continued to sit despite his brother-in-law's being a party; New York law made no provision for a

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[14] That justice preferred not to participate but had to do so, in compliance with the Rule of Necessity, because the court was unable to reach a decision without him. 143 P.2d at 656.

substitute chancellor. *See In re Leefe,* 2 Barb. Ch. 39 (N.Y.1846)." *Will,* 449 U.S. at 214 n.15. In addition, *Will* approvingly cited *Moulton v. Byrd,* in which the Alabama Supreme Court held that the Rule of Necessity compelled a justice of the peace who had previously acted as an attorney for the plaintiff not to recuse himself from deciding the case. 449 U.S. at 214 n.16 (citing *Moulton v. Byrd,* 140 So. 384 (Ala. 1932)). Each of these situations – a judge's previous involvement in a case as a government official, a judge being a party's brother-in-law, or a judge's previous service as a party's attorney – concerned the disqualification of a single judge, not of all judges. But the Supreme Court in *Will* held them all up as examples of the proper application of the Rule of Necessity, because each of them met the essential criterion for the Rule's applicability: "the case cannot be heard otherwise." *Will,* 449 U.S. at 213.

The Rule of Necessity is also not limited to courts of last resort. The cases cited in *Will* make that clear: neither *Mooers* nor *Moulton,* for instance, involved a judge of a court of last resort. This court has also invoked the Rule before, in *Duplantier v. United States,* 606 F.2d 654, 662-63 (5th Cir. 1979).[15]

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[15] Moreover, as a practical matter, "the circuit courts of appeal . . . are the courts of last resort in the run of ordinary cases." *Textile Mills Sec. Corp. v. Comm'r of Internal Revenue,* 314 U.S. 326, 335 (1941).

Thus, under *Will,* the Rule of Necessity clearly applies to cases in which the court is deprived of a quorum by the recusals of some (rather than all) judges, and it applies even if the court is not a court of last resort. If the en banc court lacks a quorum in this case, and if we have no other way of making it possible to decide this appeal, then the bottom line is that this court is required to invoke the Rule of Necessity rather than dismissing the case.[16]

The only authority that anyone has offered in opposition to the Rule of Necessity is *Chrysler Corp. v. United States,* 314 U.S. 583 (1941) (mem.), in which five Justices of the Supreme Court dismissed a case

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[16] The decision whether to invoke the Rule of Necessity properly rests with each of the active judges who are currently recused, rather than with the eight nondisqualified judges. Only they have the power to set aside their own recusals; we cannot order them to do so.

Each recused judge would need to address the debatable issue of exactly which judges should set aside their recusals. Perhaps they should all do so, because they each owe a duty to prevent this court from defaulting on its duty to decide this appeal which is properly within its jurisdiction. Or perhaps only those judges who have relatively small interests in the case, such as owning small amounts of stock which can easily be sold, should unrecuse themselves.

But, regardless of how this issue is resolved, it remains clear that "the absolute duty of judges to hear and decide cases within their jurisdiction," *Will,* 449 U.S. at 215, requires that at least some recused judges participate in the case if there is no other means of carrying out the court's duty to render a decision.

on direct appeal[17] because they lacked a quorum of six Justices as required by statute. *Chrysler* is a memorandum opinion containing no reasoning or authorities, so it is unknown why the Supreme Court did not apply the Rule of Necessity in that case. But the dismissal of the case in *Chrysler* was plainly inconsistent with the Rule of Necessity as the Court subsequently explained it in *Will:* the recusals of four Justices meant the case could not be heard otherwise,[18] so under *Will,* the Rule ought to have overridden the recusals that deprived the *Chrysler* Court of a quorum. Thus, *Chrysler* and *Will* appear to be inconsistent. The question for this court, therefore, is which of the two we should follow. *Chrysler* is a bare memorandum opinion issued in 1941 by five Justices without a quorum, whereas *Will* is a fully reasoned, unanimous opinion joined by eight Justices and issued in 1980. The fact that *Will* is more recent than *Chrysler* should be enough to tell us what to do: when two Supreme Court precedents disagree, the more recent one obviously controls. If there were any

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[17] In most cases, the Supreme Court has discretion as to whether to hear a case at all, so the Rule of Necessity does not come into play when the Court affirms a lower court's decision due to lack of a quorum. *See, e.g., Am. Isuzu Motors, Inc. v. Ntsebeza,* 128 S. Ct. 2424 (2008) (mem.). But the *Chrysler* case cannot be distinguished in this way because it came to the Supreme Court on direct appeal from a district court, rather than on a writ of certiorari.

[18] If the situation in *Chrysler* arose today, the Court could instead remit the case to a court of appeals as provided by 28 U.S.C. § 2109, but that statute had not yet been enacted in 1941.

remaining doubt about whether to follow *Will* or *Chrysler*, it should be erased by the fact that the Supreme Court's decision in *Will* rested on more than five hundred years of precedent, 449 U.S. at 213, whereas the *Chrysler* decision was supported by no explanation whatsoever.[19] Nonetheless, the majority ignores *Will* and follows *Chrysler*.

In summary, under *Will*, a judge is obligated to take part in the decision of a case, even if he or she has a personal interest in it, if the case cannot be heard otherwise. 449 U.S. at 213. This obligation overrides the federal statute on disqualification. *Id.* at 217. It arises from "the absolute duty of judges to hear and decide cases," *id.* at 215, and from the rule that federal courts cannot decline to exercise their jurisdiction, *id.* at 216 n.19. Therefore, if the en banc court lacks a quorum and if we can find no other way of carrying out our duty to decide this case, then as a last resort we must apply the Rule of Necessity rather than dismissing the appeal.

### *3. Inviting a Judge from Another Circuit*

As Judge Davis has also observed, another way to fulfill our duty to decide this appeal would be to follow the procedure set out in 28 U.S.C. § 291: "The

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[19] Additionally, two years after dismissing the appeal in *Chrysler*, the Supreme Court in *North American Co. v. SEC*, 320 U.S. 708 (1943) (mem.), followed a different approach which was consistent with the Rule of Necessity. *See infra* section B(4).

Chief Justice of the United States may, in the public interest, designate and assign temporarily any circuit judge to act as circuit judge in another circuit on request by the chief judge or circuit justice of such court." In accordance with § 291, Judge Jolly, the acting chief judge in this case, can request the designation and assignment of a judge from another circuit to give us a quorum.[20] He does not need the authorization or votes of any other judges in order to make that request, and he ought to do so: it would surely be "in the public interest," since it would enable this court to avoid defaulting on its duty to hear and decide this appeal.[21] Indeed, it is not uncommon for active circuit judges to sit by designation in other circuits, even without the kind of exigent circumstances that have arisen here. *E.g., Fleming v. Yuma*

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[20] This court's previous decision not to use § 291 in *United States v. Nixon*, 827 F.2d 1019 (5th Cir. 1987) (per curiam), does not control here. In *Nixon*, after a three-judge panel had decided the appeal, the defendant-appellant sought rehearing en banc and was denied. There were not enough nondisqualified active circuit judges to make up an en banc quorum as defined under this circuit's old Rule 35.6. However, in that case, the court was not obligated to invite outside judges to make up an en banc quorum, because a litigant has no statutory or constitutional right to rehearing en banc. *See id.* at 1022. The difference between *Nixon* and this case is that here, the panel's decision has been vacated by the granting of rehearing en banc, so this court has not fulfilled its duty to decide the appeal.

[21] The Chief Justice might have denied the request and pointed out that we already have a quorum under 28 U.S.C. § 46(c)-(d), as discussed above. That, too, would have helped us to decide this case.

*Reg'l Med. Ctr.*, 587 F.3d 938 (9th Cir. 2009) (Tymkovich, J., of the Tenth Circuit, sitting by designation); *E.I. DuPont de Nemours & Co. v. United States*, 508 F.3d 126 (3d Cir. 2007) (Michel, C.J., of the Federal Circuit, sitting by designation).

The idea that a judge of another circuit could take part in an en banc rehearing of this court may seem counterintuitive to some, but it is authorized by statute: "Such justice or judge shall have *all the powers* of a judge of the court, circuit, or district to which he is designated or assigned," subject to minor exceptions that are not relevant here. 28 U.S.C. § 296 (emphasis added). Moreover, that "judge shall discharge, during the period of his designation and assignment, all judicial duties for which he is designated and assigned" and "[h]e may be required to perform any duty which might be required of a judge of the . . . circuit to which he is designated and assigned." *Id.* Thus, a judge temporarily assigned to the Fifth Circuit becomes, for all intents and purposes, a full-fledged member of this court.[22]

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[22] Furthermore, the same statute expressly allows a judge who is designated and assigned to another circuit to participate in the rehearing en banc of any matter that has come before him or her:

> A justice or judge who has sat by designation and assignment in another district or circuit may, notwithstanding his absence from such district or circuit or the expiration of the period of his designation and assignment, decide or join in the decision and final disposition of all matters submitted to him during such

(Continued on following page)

For the acting chief judge to seek the designation and assignment of a judge to participate in the en banc rehearing of this case would certainly be an unusual step upon a rare occasion, but it is authorized by the relevant statutes. Moreover, such a step would be no more unusual than the situation that calls for it, in which the en banc court has (supposedly) lost its quorum after granting rehearing en banc and thereby vacating the panel opinion. We therefore ought to make use of § 291 in order to enable us to carry out our absolute duty to render a decision in this case.

*4. Holding the Case Over Until We Have a Quorum*

One more way in which we could fulfill our duty to decide this case would be to follow the example set by the Supreme Court in *North American Co. v. SEC*, 320 U.S. 708 (1943) (mem.). In that case, the Supreme Court, which was one Justice short of a quorum, decided to hold the case over until such time as it had a quorum. Eventually the Court obtained a quorum and was able to decide the case. 327 U.S. 686 (1946).

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period *and in the consideration and disposition of applications for rehearing or further proceedings in such matters.*

28 U.S.C. § 296 (emphasis added).

The circumstances of *North American Co.* were similar to those of this case in an important way. In 1943, the Supreme Court had reason to believe that Congress would soon amend the relevant statute in order to make it possible for the Court to obtain a quorum. *See* John P. Frank, *Disqualification of Judges,* 56 Yale L.J. 605, 626 & nn.82-84 (1947). (Ultimately Congress did not amend the statute, but Chief Justice Stone withdrew his recusal to allow the Court to decide the case. *See id.*) In the instant case, there is no indication that Congress will alter our quorum requirement, but there is an eight-month-old vacancy on this court. When the President and the Senate fill the vacancy, then nine out of seventeen active judges of this court – a majority – will be able to hear and decide this case (provided that the judge who is appointed is not disqualified). Thus, like the Supreme Court in *North American Co.,* we have reason to believe that the political branches will soon give us a quorum, and we can wait for them to do so. It is unlikely that this court's current vacancy will continue for more than the two and a half years that the Supreme Court waited in *North American Co.*

The majority has chosen to follow the Supreme Court's example in *Chrysler* while ignoring the Court's more recent example in *North American Co.* This is the wrong choice because following *North American Co.* would allow us to fulfill our absolute duty to decide this case, whereas dismissing the case contravenes that duty.

* * *

In closing, it is worth emphasizing once more that the majority's dismissal of this case is a *decision* to reject several legally valid courses of action, not a merely ministerial application of settled rules as the majority suggests. It is therefore inconsistent with the majority's own rationale, which is predicated on the claim that we lack a quorum and therefore lack the power to take any action in this case. Despite our supposed lack of power, the majority has made the decision not to recognize that we have a quorum under 28 U.S.C. § 46; not to follow the example of the Supreme Court in *North American Co.;* not to invite an outside judge under 28 U.S.C. § 291; and not to apply the Rule of Necessity under *Will.* The majority has instead decided to dismiss a case over which we have jurisdiction, thereby violating the longstanding rule, dating back to *Cohens v. Virginia,* that we lack the power to decline to exercise the jurisdiction that has been conferred on us. Because this court has an absolute duty to render a decision in this appeal, I respectfully dissent.

*United States Court of Appeals*
**FIFTH CIRCUIT**
**OFFICE OF THE CLERK**

**LYLE W. CAYCE**
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No. 07-60756, Ned Comer, et al v. Murphy Oil USA, et al USDC No. 1:05-CV-436

Dear Counsel:

The parties are requested to submit one letter brief per side of no more than twelve pages responding to this court's notification of April 30 that this en banc court has lost its quorum and cannot act on the merits of this case.

The parties may address the matter as they think appropriate. However, the court would direct their attention to Fed. R. App. P. 35(a), 28 U.S.C. § 46(c) and (d), Fed. R. App. P. 41(a) and (d)(1), 5th Cir. Local Rule 41.3, and Fed. R. App. P. 2, and the interplay of these rules and the statute in resolving the disposition of this appeal and this case. The parties may also consider the applicability of Chrysler Corp. v. United States, 314 U.S. 583 (1941); North American Co. v. Securities & Exchange Comm'n, 320 U.S. 708 (1943); and the Rule of Necessity. Each of these arguments assumes the absence of a quorum

unless Fed. R. App. P. 35(a) may be construed to provide a quorum.

The letter briefs must be filed simultaneously with the Clerk's Office before 5:00 p.m. on May 12. The parties will thereafter respond to the opposite filings in letter briefs (one response per side) of no more than six pages, which must be filed simultaneously with the Clerk before 5:00 p.m. on May 17.

Sincerely,

LYLE W. CAYCE, Clerk

By: /s/ Allison Lopez
Allison G. Lopez, Deputy Clerk
504-310-7702

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 07-60756

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NED COMER; BRENDA COMER; ERIC HAYGOOD, husband of Brenda Haygood; BRENDA HAYGOOD; LARRY HUNTER, husband of Sandra L. Hunter; SANDRA L. HUNTER; MITCHELL KISIELWESKI, husband of Johanna Kisielweski; JOHANNA KISIELWESKI; ELLIOTT ROUMAIN, husband of Rosemary Roumain; ROSEMARY ROUMAIN; JUDY OLSON; DAVID LAIN,

Plaintiffs-Appellants

versus

MURPHY OIL USA; UNIVERSAL OIL PRODUCTS (UOP); SHELL OIL COMPANY; EXXONMOBIL CORP.; AES CORP.; ALLEGHENY ENERGY, INC.; ALLIANCE RESOURCE PARTNERS LP; ALPHA NATURAL RESOURCES, INC.; ARCH COAL, INC.; BP AMERICA PRODUCTION COMPANY; BP PRODUCTS NORTH AMERICA, INC.; CINERGY CORP.; CONOCOPHILLIPS COMPANY; CONSOL. ENERGY, INC.; THE DOW CHEMICAL COMPANY; DUKE ENERGY CORP.; EON AG; E.I. DUPONT DE NEMOURS & CO.; ENTERGY CORP.; FIRSTENERGY CORP.; FOUNDATION COAL HOLDINGS, INC.; FPL GROUP, INC.; HONEYWELL INTERNATIONAL, INC.; INTERNATIONAL COAL GROUP, INC.; MASSEY ENERGY CO.; NATURAL RESOURCE PARTNERS LP; PEABODY ENERGY

CORP.; RELIANT ENERGY, INC.; TENNESSEE VALLEY AUTHORITY; WESTMORELAND COAL CO.; XCEL ENERGY, INC.; CHEVRON USA, INC.; THE AMERICAN PETROLEUM INSTITUTE

Defendants-Appellees

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Appeal from the United States District Court
for the Southern District of Mississippi

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ON PETITIONS FOR REHEARING EN BANC

(Opinion October 16, 2009,
5 Cir. 2009, ___ F.3d ___)
Revised Opinion October 22,
5 Cir., 2009, ___ F.3d ___

(February 26, 2010)

BEFORE: JOLLY, DAVIS, SMITH, STEWART, DENNIS, CLEMENT, PRADO and ELROD, Circuit Judges.[1]

BY THE COURT:

A member of the court having requested a poll on the petitions for rehearing en banc, and a majority of the circuit judges in regular active service and not disqualified having voted in favor,

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[1] Chief Judge Jones, and Judges King, Wiener, Garza, Benavides, Southwick and Haynes are recused and did not participate.

It is ordered that this cause shall be reheard by the court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.